

LINDA & MICHAEL L.

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-44

OPINION

In this appeal, Michael and Linda L. (“the Appellants”) seek reversal or remand of the Montgomery County Board of Education (“local board’s”) decision that they are not bona fide residents of the area where they seek to enroll their children in school. The local board has filed a Motion to Dismiss in Part and for Summary Affirmance in part. The Appellants have filed a Response to the local board’s motion, to which the local board has filed a Reply.

Factual Background

During the 2004-2005 school year, the Appellants began construction on a new home on Piney Glen Road, Potomac, which is in the Wayside/Hoover attendance area for Montgomery County Public Schools (MCPS). While their home was under construction, the Appellants lived temporarily in a “model home” they also own on West Montgomery Avenue, Rockville, which is in the Beall/West school attendance area. (Appeal at 7.)

The Appellants told school officials that construction on their new home would be completed within a few months and sought a change of school assignment that would allow their three children to attend schools in the Wayside/Hoover attendance area where their new home was being constructed. MCPS granted the transfer requests for both the 2004-2005 and 2005-2006 school years. (Local Bd. Opinion at 2.)

Before the beginning of the 2006-2007 school year, the Appellants’ Potomac home was still under construction and MCPS rescinded the transfers for the Appellants’ children. The children were reassigned to attend school in the Beall/West attendance area, where the family resided. (Appeal at 5-6.) The Appellants appealed MCPS’s denial, which was ultimately upheld by the local board. (Local Bd. Opinion at 2.) The Appellants’ children attended schools in the Beall/West attendance area for the 2006-2007 and 2007-2008 school years.

On August 25, 2008, the Appellants submitted a Request for School Assignment based on hardship. The Appellants sought to have their children reassigned to schools in the Wayside/Hoover attendance area where, they represented, the new home construction would be

completed within 90 days. (Local Bd. Motion at 1.) The Appellants were also negotiating a lease for a residence on Beechgrove Lane in the same attendance area. The Appellants cited the hardship of driving approximately four hours a day to transport their children to their assigned schools, and the negative impact it has had on their private business, their ability to get the children to school on time, and their children's opportunity to participate in extracurricular activities. (Appeal at ii, 5-6.)

Shortly thereafter on September 2, 2008, the Appellants signed a nine month lease for a residence on Beechgrove Lane. (Appeal, Exh. 1.) They also changed their home address to this new residence on their driver's licenses, voter registrations, bank accounts and utility bills. (Appeal at 6-7; Exhs. 4-12, 15-25.) The Appellants stated that the Beechgrove Lane residence was a temporary one being used until their new home is complete, and one which would allow their children to attend schools in the Wayside/Hoover attendance area. (Appeal at 10, 13; Local Bd. Motion at 2.)

MCPS recommended denial of the transfer requests because attendance waivers had been granted for the Appellants for the 2004-2005 and 2005-2006 school years and the Appellants had not made considerable progress on completing their home construction. (Appeal at ii.) The Appellants appealed the decision to Larry A. Bowers, chief operating officer. Mr. Bowers referred to matter to Mary B. Dempsey, Hearing Officer, to submit a report and recommendation to him. (Local Bd. Motion at 2.)

Ms. Dempsey reviewed the Appellants' lease for the Beechgrove Lane property and also spoke with the landlord. She acknowledged that some furniture was moved into the residence, but found no further evidence that the family lived there or was planning to live there until the Piney Glen home was completed. (*Id.* at 3.)

In addition, Ms. Dempsey did not find a phone number for the Appellants at the Beechgrove Lane property, but did for their West Montgomery Avenue property. Ms. Dempsey further determined that the Appellants' West Montgomery Avenue property was not listed for sale or rent until a week after they said it was listed. (*Id.* at 3.)

Ms. Dempsey was not persuaded by much of the information that was supplied by the Appellants. She questioned why they would spend such a significant amount of money on a rental home for nine months if their new home would be completed within 90 days, as they represented. She also questioned "whether the purported residency at Beechgrove would constitute a bona fide residence rather than a superficial residence since it was admittedly rented for the specific purpose of trying to enroll the children in Wayside and Hoover." (*Id.*)

Ms. Dempsey recommended that the appeal be denied. In a letter dated September 9, 2008, Mr. Bowers adopted her recommendation. The Appellants, through counsel, submitted additional documentation and asked that MCPS "revisit" the decision. Mr. Bowers' reaffirmed his decision by letter dated September 19, 2008. The Appellants next appealed to the local

board.

Before the local board, the Appellants changed the issue on appeal from transfer or school assignment to residency. They argued that they established a bona fide residence in the Wayside/Hoover attendance area by entering a legally binding lease, as well as by changing their home address on their driver's licenses, bank, telephone and utility records. (Local Bd. Motion at 4; Notice of Appeal Exh. 13.) The Appellants argued they should be treated the same as other residents of the Wayside/Hoover attendance area.

The local board considered the evidence presented to Ms. Dempsey and Mr. Bowers, and additional evidence the Appellants presented after Mr. Bowers' decision and the local superintendent's response. (Local Board Motion at 5-6.) The local board also looked to Policy JEE, *Student Transfers*, and Policy JED, *Residency, Tuition and Enrollment*, for guidance on the appeal.

Policy JEE provides that students are expected to attend the school within the "established area in which they reside" and that transfers from the home school may be permitted in cases of "documented unique hardship." In addition, Policy JED defines "bona fide residence" as "one's principal residence maintained in good faith, and does not include a residence established for convenience." Policy JED does not require an intent to "reside indefinitely or permanently at the present place of residence", but it provides that "[d]etermination of a person's bona fide residence is a factual one and must be made on an individual basis."

Based on these local policies and the Appellants' evidence, the local board was not persuaded that the Appellants were bona fide residents of the Beechgrove Lane property. First, the board concluded that the Appellants used the "expected imminent completion" of their Piney Glen home as a basis for enrolling their children in the Wayside/Hoover schools since 2004. The board found it curious that the Appellants executed an expensive lease on the Beechgrove Lane property when, as they represented, the Piney Glen home would be complete within 90 days. (*Id.* at 6.)

Further, the local board agreed with the local superintendent that the nine month "opt out" provision in the Beechgrove Lane lease generally coincided with the school calendar and strongly implied that the residence was temporarily established so the Appellants' children could attend particular schools. The board also found more questions rose than were answered in the Appellants' lease of the West Montgomery Avenue property because it listed a business as the tenant of residential property and a "For Rent" sign remained on the property. (*Id.* at 7; Appeal Exh. 2.)

In considering the evidence before it, the local board noted that "[t]his matter is hampered by the changing nature of the request and issue on appeal... This case has continued an evolution that is a result of the shifting positions taken by the [Appellants]." (*Id.* at 5.) Consequently, the board considered the big picture of the case "far from crystal clear", but ultimately determined

that the “unusual circumstances in this matter point to a failure to establish bona fide residence, and suggest, at best, the establishment of some temporary arrangement designed to gain entry to particular schools.” (*Id.* at 6.)

In the last paragraph of its opinion, the board stated:

Any further assessment of the issue would likely involve the type of inquiry performed by the residency office to determine residency, based on the full factual circumstances rather than a changing argument and changing record as this appeal presents. ... [S]hould the [Appellants] reside at the Beechgrove address under circumstances that would lead a reasonable person to conclude that it is not a temporary residence, the decision below could be revisited by the appropriate officials.

Id. at 7. Accordingly, in its opinion rendered December 9, 2008,¹ the local board affirmed the decision of the chief operating officer. A copy of the decision was mailed to the Appellants’ counsel on December 10, 2008. (Local Bd. Motion, Exh. A.)

Reading the last paragraph of the local board’s opinion as an invitation to submit materials for the board’s reconsideration, the Appellants’ counsel filed a “Request to Revisit” on January 7, 2009. (Appeal, Exh. 3.) The Appellants argued that the local board’s decision violated the 14th amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights by denying them the same educational opportunities as other residents in their attendance area.

The Appellants further argued that the local board ignored clear evidence of the significant economic hardships the family faced because of the housing market crisis. The Appellants explained that as a result of this crisis, they had to move somewhere and their choice to move in a residence “based up (sic) the school cluster they wished to be in” is no different from other county residents. (*Id.* at 3; *see also* exh. 14.)

Further, the Appellants asserted that it because they established that they were bona fide residents of the Wayside/Hoover community and their children should be enrolled in schools for that area was arbitrary and capricious for the local board not to enforce the plain language of Policy JEE and JED (*Id.* 3-4.) The Appellants requested a full investigation into their appeal. (*Id.* at 5.) The local board denied the request by letter dated February 11, 2009.

¹ While the local board’s decision was issued on December 9, 2008, the appeal was considered in closed session at its meeting on November 11, 2008. After voting to affirm the decision of the chief operating officer, the board immediately announced its decision in public session for reasons that would be set forth in its written opinion at a later date. (Local Bd. Motion at 5.)

This appeal to the State Board followed, in which the Appellants challenge both the December 9, 2008 local board decision and the local board's denial of their request for reconsideration on February 11, 2009. (Appeal at iii.)

Standard of Review

This appeal involves a decision of the local board involving a local policy. As such, the local board's decision is considered prima facie correct and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.03E(1); *Betty Jo Eubanks v. Balt. City Bd. of School Commissioners*, MSBE Op. No. 09-33 (2009).

Legal Analysis

The Appellants present numerous challenges to the merits of two local board decisions – one rendered in the December 9, 2008 opinion, which found they were not bona fide residents of their Beechgrove Lane rental property, and the other communicated by letter dated February 11, 2009, which denies their request for reconsideration.

The local board has filed a motion to dismiss the appeal of its December 8, 2008 decision based on untimeliness. The local board has also filed a motion to dismiss or summarily affirm its February 11, 2009 decision.

Timeliness of Appeal of December 9, 2008 Decision

State Board's regulations require a party to submit an appeal "within 30 calendar days of the decision of the local board" which "runs from the later of the date of the order or the opinion reflecting the decision." COMAR 13A.01.05.02B(1). An appeal is deemed transmitted within the limitations period if it has been hand delivered to the State Board or deposited in the United States mail, as registered or certified, before the expiration of the time period. COMAR 13A.01.05.02B(3).

Here, the local board's decision was rendered by opinion on December 9, 2008 and mailed to the Appellants' counsel on December 10, 2008. (Local Bd. Motion, Exh. A.) Accordingly, any appeal of its decision would have been due to the State Board by January 8, 2009. The Appellants did not hand deliver their State Board appeal, however, until March 12, 2009, more than two months after it was due.

It is well settled that time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. *Scott v. Bd. of Educ. of Prince George's County*, 3 Op. MSBE 139 (1983). The State Board has strictly enforced this rule of law and will only excuse untimely filings for the most exceptional circumstances. *Betty Jo Eubanks v. Baltimore City Bd. of School Commissioners*; *Andrew Smith v. Carroll County Bd.*

of Educ., MSBE Op. No. 08-28; *Residents of Hampshire Greens Community v. Montgomery County Bd. of Educ.*, MSBE Op. No. 05-13; *Norman v. Howard County Bd. of Educ.*, MSBE Op. No. 03-37. There are no exceptional circumstances here that would excuse the untimely filing of the appeal.

Denial of Request for Reconsideration

The Appellants also appeal the local board's February 11, 2009 denial of their reconsideration request. That appeal was timely filed on March 12, 2009. We therefore address the merits of this issue.

The Appellants argue that this local board decision is arbitrary and capricious because it disregards language in the local board's December 8, 2008 decision inviting reconsideration of their case. They contend that the decision contains no explanation for the local board's refusal to reconsider and fully investigate the evidence presented by the Appellants, including evidence of the significant economic hardships they face and proof of their bona fide residency at the Beechgrove Lane address.

Conversely, the local board asserts that local policy provides that the decision whether to re-hear a case is in its "sole discretion". Further, the board argues that it already considered the facts that the Appellants want to re-introduce and that the Appellants' misreading of its December 8, 2008 opinion does not entitle them to a favorable response to their reconsideration request.

Local Board Policy BLB, *Rules of Procedure in Appeals and Hearings*, provides that parties aggrieved by a local board decision and order may apply for rehearing within 30 days of the date of the decision. (*Id.* at 11.) The policy provides that "[a]n application for rehearing shall state with specificity the reasons therefore, and **action on any application shall lie in the sole discretion of the board.**" (*Id.*, emphasis added).

Based on this policy and our review of the record, we agree that the local board retained full discretion whether to grant the Appellants' reconsideration request. That discretion reasonably includes the option to deny such a request, with or without explanation. The Appellants do not dispute this, but rather argue that the local board's opinion implicitly invited them to seek reconsideration of their appeal.

In our view, it matters not whether the board "implicitly" invited the Appellant's to file a request for reconsideration. The board, of course, retained the sole discretion to grant or deny that request. In this case, because the request was filed within only a month of the original decision, it was highly unlikely that the facts at issue had changed. In our view, the board did not abuse its discretion by denying the request outright.

Request for Hearing

Finally, the Appellants have requested a hearing before the State Board. The State Board generally reviews the appeal of a local board decision on a controversy or dispute regarding a policy or regulation of the local board "on the record made before the local board" and may decide the appeal "without a hearing or oral argument." COMAR 13A.01.05.06A-B. In our view, the record made before the local board is complete and clear. Therefore, we deny Appellants' request for a hearing.

Conclusion

For all of these reasons, we dismiss as untimely the Appellants' appeal of the local board's December 9, 2008 decision and affirm the local board's February 11, 2009 decision denying Appellants' request for reconsideration.



James H. DeGraffenreidt, Jr.
President

ABSENT

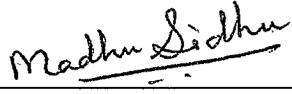
Charlene M. Dukes
Vice President



Mary Kay Finan



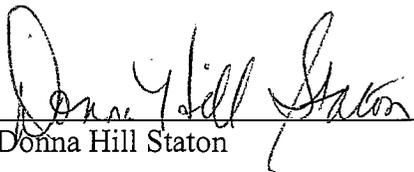
S. James Gates, Jr.



Madhu Sidhu

ABSENT

Guffrie M. Smith, Jr.



Donna Hill Staton

ABSENT

Ivan C.A. Walks



Kate Walsh

December 10, 2009